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NOTES.

CONSTITUTIONAL LAW—SEARCHES AND SEIZURES—RETURN OF PAPERS UNLAWFULLY TAKEN—What has long been deemed one of the most sacred and jealously guarded rights of English-speaking people is the inviolability of their homes from illegal intrusions by officials of the government. This right is guaranteed to the people of the United States by the Fourth Amendment to the Constitution, which provides that:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated; and no Warrant shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This right is now firmly and unquestionably established, but the courts have not always been consistent in applying it to individual cases. At times there has been a seeming tendency to interpret this amendment broadly; at others, the interpretation has been extremely narrow and restricted, with the result that some degree of confusion has arisen as to the actual state of the law.

Although many cases had arisen in the State courts under similar provisions in State constitutions, the Supreme Court was not called upon to construe, in an important case, this amendment to the Federal Constitution until 1885, when the case of *Boyd* v. *United States*[1] came before it for adjudication. In that case the question arose as to the constitutionality of an Act of Congress authorizing a court of the United States on motion of the government attorney, in proceedings other than criminal, arising under the revenue laws, to require the defendant or claimant to produce in court his private books and papers on pain of having the allegations stated in the motion taken as confessed.[2] The court, in an elaborate opinion by Mr. Justice Bradley, concluded that this act was void as being in contravention of the Fourth Amendment to the Constitution.

In its decision the court construed that amendment very broadly, being no doubt greatly influenced by the experience of the Colonies prior to the Revolution. The fear of the arbitrary exercise of power restrictive of individual liberty by executive officials of the government, was a strong incentive to a broad interpretation of the provisions safeguarding personal privileges and immunities. The court refers to the case of *Entick* v. *Carrington and Three Other King's Messengers,*[3] in which Lord Camden, in a celebrated decision, declared illegal, at common law, the general warrants issued by the Secretary of State, authorizing officers of the Crown to enter and search any house where it might be suspected that seditious libels were published;[4] and the court observed that the Fourth Amendment was adopted in order to safeguard the people against a recurrence of such practices under the new government. The court concludes that to compel a person to produce in court his private books and papers, is to accomplish in an indirect manner, what the Fourth Amendment was designed to prevent.

This, it will be seen, was a very broad application of the provision against unreasonable searches and seizures, and, if strictly adhered to would seriously restrict the usefulness of the *subpœna duces tecum;* for if to compel a person to produce in court his private books and papers, to be used as evidence by the government, is equivalent to an unreasonable search and seizure, it would seem

[1] 116 U. S. 616 (1885).
[2] Act June 22, 1874, 18 Stat. 186, Sec. 5.
[3] 19 Howell's State Trials, 1029 (1765).
[4] Cooley's Constitutional Limitations, 424-434 (7th Ed.).

that to compel a person to produce, for similar purposes, papers of a private nature of which he was custodian merely, would also be equivalent to an unreasonable search and seizure. The courts, however, have refused to carry the analogy so far, on the theory that the right sought to be protected by the Fourth Amendment is "the indefeasible right of personal security, personal liberty and personal property," [5] and that to compel a person, by use of the *subpœna duces tecum,* to produce in court papers which are in his lawful custody, but not his own private property, is not an invasion of this right. Doubtless this conclusion was inspired by motives of utility. But even the *subpœna duces tecum* must be reasonably specific as to the papers and documents to be produced, and a *subpœna* commanding an officer of a corporation to produce in court *all* of the contracts, correspondence, reports, accounts, *etc.,* of the corporation with six other firms, is analogous to an unreasonable search and seizure, because too general in its terms, and is therefore void under the Fourth Amendment.[6]

If a person cannot be compelled to produce in court, to be used against himself, his private books and papers, because in violation of the immunities guaranteed by the Fourth and Fifth Amendments, one might suppose that if such books, papers and other evidence were actually procured by an illegal search and seizure, they would not be permitted to be offered in evidence over the objection of the person from whom they were taken; for in the final result it is of little practical difference to a person accused of any offense, whether he be compelled himself to supply the evidence to be used against him or whether such evidence is taken from him by an agent of the government in an illegal search and seizure, and is then used against him over his objection. In either case his constitutional rights are violated with the same disastrous result to himself. Yet there are many decisions which hold that the wrongful or illegal means of obtaining evidence is alone no objection to its admissibility, if otherwise competent.[7]

There is, however. a well-recognized method by which a person may prevent the introduction, in evidence against him, of books and papers which have been acquired by an illegal search and seizure,

[5] Boyd v. United States, *supra,* n. 1.

[6] Hale v. Henkle, 201 U. S. 43 (1906). It is also interesting to note that the court, in a divided opinion, said: "While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand, when charged with an abuse of such privilege," thereby suggesting that perhaps the immunities guaranteed by the Fourth and Fifth Amendments, apply to natural persons only, and not to corporations.

[7] Adams v. New York, 192 U. S. 585 (1904); Bacon v. United States, 97 Fed. Rep. 35 (1899); Trask v. People, 151 Ill. 523 (1894); Commonwealth v. Dana, 2 Met. 329 (Mass. 1841).

and that is to petition the court for their return before the trial at which they are intended to be introduced.[8] It would seem that this is carrying the maxim "to the diligent belongs the reward" very far; and it suggests that a person may absolutely forfeit his substantive rights, as guaranteed by the Constitution, through a delay or misapprehension as to the proper procedure to be taken in order to protect those rights. In *Weeks* v. *United States*,[9] the court distinguishes *Adams* v. *New York*,[10] by pointing out that in the former case the accused made "seasonable application" for a return of the papers wrongfully seized, and that therefore the lower court erred "in holding them and permitting their use upon the trial."[11] In *Lum-Yan* v. *United States*,[12] the court overruled the objection of the defendant to the admission in evidence of papers which had been taken from him by an unlawful search and seizure, because, as the court observes, "it does not appear that the plaintiff in error seriously resisted the search that was made." From this it might be taken that a person's right to protection under the Constitution is made to depend upon his physical prowess in resisting any encroachemnt of his rights.

The legal principle to be gathered from the cases seems to be that if papers are taken by officials of the government, in an illegal search and seizure, they may be recovered by petition to the court, even though they contain evidence essential to the successful prosecution of an action against the one from whom taken. But if no effort is made to recover such papers until the trial of the action, it is no objection to their admissibility that they were seized illegally by the government.[13]

E. L. H.

EQUITY—ENFORCEMENT OF DECREES—REMEDIES FOR DISOBEDIENCE—Punishment for contempt of the King's writ was the original and characteristic feature of the processes of Court of Chancery, and for disobedience to its decrees nothing could be done but order the contumacious party to prison, there to remain until he would obey.[1] A writ of attachment first issued against his per-

[8] Weeks v. United States, 232 U. S. 383 (1914); United States v. Friedberg, 233 Fed. Rep. 313 (1916).

[9] *Supra*, n. 8.

[10] *Supra*, n. 7.

[11] See also United States v. McHie, 194 Fed. Rep. 894 (1912), and, United States v. McHie, 196 Fed. Rep. 586 (1912)

[12] 193 Fed. Rep. 970 (1912).

[13] The prohibition in the Fourth Amendment against unreasonable searches and seizures, does not apply to the States. National Safe Deposit Co. v. Stead, 232 U. S. 58 (1914).

[1] J. R. v. M. P. *et al.*, Y. B. 37 H VI, Ames' Cases in Equity, 1.